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Supreme Court of the United States

October Term, 1973

No. 73-724

INTERAMERICAN AIR FREIGHT CORPORATION,
a California corporation,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Interamerican Air Freight Corporation, a California corporation, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Ninth Circuit entered in this case on August 6, 1973, which dismissed a petition to review an order of the Civil Aeronautics Board on the ground that the latter order was not subject to review by the court.

OPINIONS BELOW

The opinion of the Court of Appeals was in the form of an order of dismissal of petitioner's petition for review and was based on the Court of Appeals' construction of Sections 1461 and 1486 of 49 United States Code and *C & S Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

The order of the Civil Aeronautics Board which petitioner sought to have the Court of Appeals review is Civil Aeronautics Board Order No. 71-10-114, approved October 23, 1971, and served October 28, 1971.

A copy of the opinion and order of the Civil Aeronautics Board is attached hereto as Appendix A. A copy of the Order of Dismissal issued by the Ninth Circuit Court of Appeals is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where an order of the Civil Aeronautics Board, approved by the President, is challenged on the ground that the Board, in issuing the order, exceeded its jurisdiction and contravened the Fifth Amendment, is such an order reviewable by a Court of Appeals upon a timely petition for such review, under Section 1006 of the Federal Aviation Act (49 U.S.C. 1486)?

2. Does Section 1006 of the Federal Aviation Act

(49 U.S.C. 1486), authorizing judicial review of described orders of the Civil Aeronautics Board, include those which grant or deny applications by citizen indirect carriers to engage in overseas and foreign air transportation which are subject to approval by the President under Section 801 of the Federal Aviation Act (49 U.S.C. 1461)?

3. Does Presidential approval per se make valid invalid orders of the Board?

4. Where Congress has enacted precise statutory criteria for determining the citizenship of a California corporation for purposes of the Federal Aviation Act (49 U.S.C. 1301[13]), is the Civil Aeronautics Board bound by such criteria in evaluating the application of such a corporation for authorization to operate as an international air freight forwarder?

5. Is an order of the Board, predicated on whim and fantasy and unsupported by substantial competent evidence, which denies five United States citizens the right to engage in a lawful business by means of a California corporation of which they are the legal and beneficial owners of 75 per cent of the voting stock, a denial of due process of law under the Fifth Amendment to the Constitution of the United States?

6. Does the relevant statute (49 U.S.C. 1486) require the Civil Aeronautics Board to support its order by substantial competent evidence in the record of its proceedings, under penalty of having the order vacated or modified by a reviewing court?

7. Where the Board has ordered specific issues to be developed in an evidentiary proceeding before an Examiner and where the Examiner, after having reviewed

documentary evidence and evaluated the credibility of witnesses, has resolved the said issues in favor of the petitioner, is an order of the Board which repudiates the finding of the Examiner, arbitrary, capricious and an abuse of discretion?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this petition are Article I, Section 8 (commerce clause) and the Fifth Amendment (due process); the statutes primarily involved are 49 U.S.C. Sections 481, 488(b), 1301(13), 1461 and 1486.

STATEMENT OF THE CASE

This proceeding arose by reason of three separate applications to the Civil Aeronautics Board:

1. An application by Willy Peter Daetwyler, a Swiss citizen resident in the United States, doing business as Interamerican Airfreight Co., (hereinafter referred to as "Daetwyler") for renewal of the Section 402 Foreign Air Carrier Permit (Docket 22214, Record p. 1);

2. An application of Interamerican Air Freight Corporation, a California corporation (hereinafter referred to as "the Corporation") for an Operating Authorization as an international air freight forwarder pursuant to Part 297 of the Economic Regulations (undocketed, Record p. 16); and

3. An application by Daetwyler and the Corporation for approval of control relationships (Docket 22285, Record

p. 55).

Leave to intervene was granted on March 9, 1971 (Record p. 143) to the Air Freight Forwarders Association (herein called "AFFA") on behalf of eight of its members: Airborne Freight Corporation; Air-Sea Forwarders, Inc.; Cal-Air Forwarders, Inc.; Circle Airfreight Corporation; International Customs Service, Inc.; Novo Airfreight; Profit by Air, Inc.; and Shulman Air Freight.

By Board order 71-2-24 (Record pp. 133 to 137), the three applications were consolidated for public hearing. In so doing, the Board stated:

> "We are concerned over the inter-locking relationships involving officers, directors and stockholders of [Interamerican Air Freight Corporation] with other companies controlled by Mr. Daetwyler (*e.g.*, Star and Forwarding) and the possibility of the latter's domination and control of [Interamerican Air Freight Corporation] through these relationships which exist presumably at his sufferance. This question is sufficiently complex as to warrant its development in an evidentiary proceeding." (Record p. 137.)

A public hearing was held in Washington, D. C. on March 10 and 11, 1971 before William J. Madden, Hearing Examiner. Four of the stockholders of the Corporation (Daetwyler, Stapleton, Saxer and Wintsch), representing ownership of 90 per cent of the issued and outstanding stock of the Corporation, traveled to Washington, testified, and were cross-examined not only by counsel for AFFA but by counsel for the Bureau of Operating Rights of the Civil Aeronautics Board. No testimony or documentary evidence

was offered by AFFA or the Bureau of Operating Rights. All of the documentary evidence requested by the Examiner was supplied by the applicants (Record pp. 380 to 499). On May 24, 1971, Examiner Madden rendered his decision (Record pp. 561 to 584 inclusive) in which he made the following "**Ultimate Findings and Conclusions**":

> "On the basis of the foregoing findings and conclusions and all the facts of record it is found and it is recommended that the Board find that Interamerican Air Freight Corporation is a citizen of the United States within the meaning of section 101(13) of the Federal Aviation Act of 1958 and Part 297 of the Economic Regulations of the Board; that Willy Peter Daetwyler, a Swiss citizen who owns 25 percent of the issued stock of the Corporation and will serve as a director will exercise a degree of influence in the operations of the company which, however, will not amount to control in fact; to the extent that some influence and a degree of control may result by reason of his controlling interest in Interamerican Warehouse Corporation, Interamerican Forwarding Corporation, Star Truck and Warehouse Corporation, Interamerican Customs Brokers Corporation and Daetwyler Enterprises Corporation, said control will not be inconsistent with the public interest and should be approved; that the applicant Corporation has in all other respects met the requirements for the issuance of an Operating Author-

> ization as an international air freight forwarder pursuant to Part 297 of the Economic Regulations and such an authorization should issue, subject to a condition that any change in the stockholdings and in the persons serving as officers and directors from that now obtaining shall be promptly reported to the Board. The applications consolidated herein should be dismissed in all other respects."

Exceptions to Examiner Madden's decision were filed by the Bureau of Operating Rights (Record p. 585) and by AFFA (Record p. 586).

On October 28, 1971, the Board issued an opinion (Record p. 602 *et seq.*, Appendix A annexed hereto) in which it stated that "the questions here at issue are principally ones of law and policy" (Appendix A p. 3, footnote 3). The Board further stated that "[t]he single disputed issue in this case is whether Interamerican [Air Freight Corporation] qualifies as a 'citizen of the United States' pursuant to Section 101(13) of the Federal Aviation Act in such a manner that it would be in the public interest to issue international freight forwarder authority to the carrier pursuant to the provisions of Part 297 of the Board's Economic Regulations" (Appendix A p. 3). The Board then proceeded to repudiate, in their entirety, Examiner Madden's findings of fact on the issue of control: "It is our view that Daetwyler is in a position of control of Interamerican [Air Freight Corporation], and that, as a result of such control, Interamerican would not qualify as a citizen of the United States in accordance with the provisions of Section 101(13) of the Act" (Appendix A p. 4).

On the same day, the Board issued Order No. 71-10-114 (Record p. 601, Appendix A p. 1) as follows:

> "Foreign air carrier permit held by Willy Peter Daetwyler, authorizing indirect foreign air transportation of property from any point or points in the United States to any point or points outside the United States, renewed for a period of five years and issued in amended form to Willy Peter Daetwyler (Switzerland) d/b/a Interamerican Airfreight Co. (U.S.A.).
>
> "Application of Interamerican Air Freight Corporation for an Operating Authorization as a U. S. citizen international air freight forwarder pursuant to Part 297 of the Board's Economic Regulations, denied.
>
> "Application of Willy Peter Daetwyler and Interamerican Air Freight Corporation for approval of certain control and interlocking relationships pursuant to section 408 of the Federal Aviation Act, dismissed."

Petition For Review To The Ninth Circuit Court Of Appeals:

On December 17, 1971, petitioner filed a petition for review of the Board's order, pursuant to 49 U.S.C. 1486 and within the sixty-day period provided for therein.

The Decision Of The Court Below:

In the Court of Appeals, petitioner sought review of the Board's order, on the grounds that the order was illegal because it exceeded the power and authority of the Board

and because the action of the Board constituted a denial of due process under the Fifth Amendment to the Constitution of the United States. Petitioner also contended that the Board's action was arbitrary, capricious and an abuse of discretion and that the findings of the Board were not supported by substantial evidence.

The Court of Appeals did not reach the merits of the case. Instead, it entered an "Order of Dismissal" on August 6, 1973. The Court stated:

> "The denial by the Board and the President of exemptions to Interamerican [Air Freight Corporation] from permit requirements under 14 C.F.R. § 297, *et seq.*, we conclude, is not subject to our review. We base this on our reading of 49 U.S.C. § 1486, and *C&S Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). (Appendix B annexed hereto p. 15.)

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

The relevant facts are succinctly and accurately stated in the decision of the Examiner. We cannot improve on the language of the Examiner and, accordingly, have set it forth herein verbatim and have adopted it as our statement of facts relevant to the issues in this case:

"Pertinent Background

"The experience of Daetwyler as an individual and the operations of various companies with which he is associated were reviewed in the decision which resulted in the issuance

of the 1965 foreign air carrier permit. It was there established that he had been involved in the international forwarding business and in the public warehousing and related services for 25 years, and that he was recognized as an international trade consultant and an expert on international payments and similar matters. He was president and owner of Zurich Warehouse Corporation, of Switzerland, an international freight forwarding company that had been founded by his father in 1910. He was also the owner of WABAG A.G., another Swiss company which engaged in various aspects of international trade and consulting work. He also had an interest in two Swiss manufacturing companies.

"Daetwyler moved to Los Angeles in 1959, transferring approximately one million dollars, and there organized three companies to carry on warehousing, trucking and international surface freight forwarding operations. These consisted of Slauson Warehouse Corporation, Interamerican Warehouse Corporation and Interamerican Forwarding Corporation, in all of which he held controlling interest. These activities and the intercompany relationships that obtained in 1965 continue to the present and Daetwyler continues to be a Swiss citizen.

"The application resulting in the grant of the original permit was filed by Interamerican Forwarding Corporation, a California corporation, the stock of which was and continues to be owned by Zurich Warehouse Corporation (30 percent), WABAG A.G. (30 percent), both wholly owned by Daetwyler, and Ernst Goehner, a Swiss national, (40 percent). While the Board reached a decision that a permit should issue, it also decided that it could not properly be issued to the applicant Corporation but that it would be

appropriate to issue it to Daetwyler in his individual capacity.

"In reaching this conclusion the Board noted that issuance of foreign air carrier permits to Swiss nationals or Swiss corporations was not governed by a specific agreement between the governments of the United States and Switzerland relating to the exchange of air transportation operation rights but rested rather on the basis of reciprocity in general. Reciprocity was established with reference to the Treaty of Friendship and Commerce between the Swiss Federation and the United States (11 Stat 481; Treaty Series 353). However, while thus adequately established, the Board was unable to conclude that the applicant Corporation could qualify as a Swiss citizen entitled to the reciprocal treatment.[3] In granting the permit to Daetwyler in his individual capacity, the Board recognized that no formal application for such a permit had been presented. Nevertheless, on the basis of a finding that Daetwyler was the real party in interest and that he was fit, willing and able, and since there appeared to be no sound reason to go through another proceeding, it issued the permit in that manner.

"Daetwyler Operations and Companies

"Daetwyler conducts his business enterprises from headquarters in Los Angeles, California through five corporations and as an individual with respect to the section 402 permit operations. All of the companies are

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"[3]While it could not qualify as a citizen of the United States within the meaning of section 101(13) of the Act, by reason of its foreign management and stock ownership (Swiss), it did not, for that reason, achieve the status of a Swiss citizen.

organized under the laws of California but the controlling interest is owned by Daetwyler personally. Three of these are the companies which he organized shortly after his arrival in Los Angeles, *viz.*, Slauson Warehouse Corporation, Interamerican Warehouse Corporation and Interamerican Forwarding Corporation. The activities of these companies were described in the record in the proceeding related to the original permit application. Their operations continue as therein described but Slauson Warehouse Corporation has now, by change of name, become Daetwyler Enterprises Corporation.

"The other two companies are Star Truck and Warehouse Corporation (Star), and Interamerican Customs Brokers Corporation (Customs Brokers). Star operates a public warehouse and a trucking operation under appropriate permits issued by the California Public Utilities Commission and the Interstate Commerce Commission. It operates 120 mobile units which are used for the most part to carry shipments from the warehouse to destination. The extent of operations is indicated by gross operating revenues of $2,128,000 in 1970. Customs Brokers, as the name implies, acts as customs agent for shippers and consignees, under appropriate licenses. It does not offer or conduct any common carrier activities. Gross operating revenues in 1970 were approximately $2,000,000. While each of the Daetwyler corporations and the d/b/a company has its distinct field of operation they nevertheless operate in a complementary manner and under the supervision of the same management team for which Daetwyler provides the principal general management authority.

"Part 297 Applicant Corporation

"While Daetwyler did not apply for the original section 402 permit in his individual capacity, he accepted it and has operated thereunder despite a strong preference to have carried on this business in a corporate capacity. He seeks by the establishment of the new company which is the Part 297 applicant to avoid operating in an individual capacity and at the same time to provide a vehicle for extending to his management team an opportunity to acquire an equity interest in at least part of his operations. To achieve this double purpose the Corporation was planned and organized so as to meet the citizenship requirements of section 101(13) of the Act.[4] It was organized under the laws of California, the president and two-thirds of the directors and other managing officers are citizens of the United States and 75 percent of the voting stock interest has been issued to U. S. citizens.

"The charter authorizes the issuance of 100,000 shares of one dollar par value voting stock, the only class of stock, and 15,000 shares have been issued. Following is a list of stockholders, officers and directors with an indication of the corporate capacity in which they serve, the citizenship of each and the proportion of stock owned.[5]

"[4]Section 101(13) 'Citizen of the United States' means ' * * * (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions."

"[5]There are no other persons who would qualify as 'managing officers' within the meaning of section 101(13).

NAME	CORPORATE CAPACITY	CITIZEN	STOCK HOLDING
Fred E. Saxer	President	U.S.	20%
F. G. Stapleton	Secretary-Treasurer, Director	U.S.	30%
W. P. Daetwyler	Director	SWISS	25%
Werner Schmid	Vice President, Accounting, Assistant Secretary	U.S.	5%
H. John Wintsch	Vice President	U.S.	15%
Larry Pittman	Director	U.S.	5%

"All of the foregoing individuals have been intimately connected with Daetwyler and his business enterprises for many years, some of them from the inception of his operations in the United States. F. G. Stapleton is a lawyer by profession whose practice includes considerable corporate and business law work. He has acted as lawyer and on occasion as business advisor to Daetwyler from the time of his arrival in the United States. He prepared the necessary documents for the incorporation of the various Daetwyler companies and he serves as secretary and a director in each of them.

"Fred E. Saxer has been associated with Daetwyler for 12 years and has been engaged in the transportation business for 22 years. He serves as executive vice president of Interamerican Forwarding Corporation, as manager of the company operated by Daetwyler in his individual capacity, and as vice president of Customs Brokers. His salary of $1,800 a month is allocated among the three companies and in addition he participates in a profit sharing plan which netted about $6,000 in 1970. He also owns a 10 percent stock interest in Customs Brokers.

"H. John Wintsch has had 15 years experience in the transportation business, the last ten with Daetwyler. He serves as a vice president of Interamerican Forwarding Corporation and as a manager of the Daetwyler individual operation. His salary of $1,400 a month is allocated among these companies and his profit sharing bonus amounted to $3,000 in 1970.

"Werner Schmid serves as vice president, accounting, of all of the Daetwyler companies and his salary of $1,400 a month is allocated among them. He received a bonus of $4,000 for 1970.

"Larry Pittman serves as executive vice president of Interamerican Warehouse Corporation and Star Truck and Warehouse Corporation. His salary of $1,800 a month is allocated between these two companies and his profit sharings for 1970 produced an additional $10,300.

"The decision as to the allocation of the stockholdings was Daetwyler's but the amounts alloted were agreeable to each individual and to the group as a whole. Each paid into the company from personal funds the proportionate par value of his portion of the 15,000 shares that were issued. A tentative agreement has been reached among them whereby in the event additional shares of the authorized stock are issued each will have an opportunity to subscribe to an amount proportionate to his initial holdings, except as to Daetwyler. His 25 percent interest can not be increased as long as the company must maintain its U. S. citizenship as defined by section 101(13). The articles of incorporation were drafted so as to specifically provide for such preemptive or preferential rights of stockholders.

"Stapleton, Daetwyler, Saxer and Wintsch who account

for 90 percent of the stockholdings testified in person with respect to the possibility that Daetwyler would in fact control the affairs of the company even though his stock ownership would never exceed 25 percent. Daetwyler firmly disavowed any such intention and the other three firmly insisted they would not be susceptible to such an attempt. However, they recognized that there would be an area of influence natural to a fellow officer, director and substantial stockholder, and it was obvious that they have a high regard for Daetwyler's business judgment. It was also obvious that Daetwyler reciprocated with a high regard for them and for the remaining two stockholders, with a recognition of their contributions to the success of his companies, and with an appraisal of their integrity which would not include any allowance for any subverting of their honest business judgments.

"Extending an equity interest to valuable associates is part of a Daetwyler plan which took shape a few years ago and is endorsed by his partner in Switzerland who maintains a 40 percent interest in some of his companies. It has already been implemented insofar as Saxer is concerned with a 10 percent interest in Customs Brokers. Guy Fox, another Daetwyler associate and a U. S. citizen, but not involved in the applicant company, owns a 25 percent interest in Customs Brokers."

REASONS FOR GRANTING THE WRIT

Petitioner asks this Honorable Court to grant its petition for writ of certiorari for the following reasons:

1. The issues as to the scope of judicial review of

orders of the Civil Aeronautics Board are of national significance and import; see *C & S Airlines v. Waterman S.S. Corp.* (1948), 333 U.S. 103; *Pan American v. C.A.B.* (1958), 261 F.2d 774 (C.A. D.C.); *American Air Lines v. C.A.B.* (1965), 348 F.2d 349 (C.A. D.C.); *World Airways v. Pan Am* (1967), 380 F.2d 880, (1968) 391 U.S. 468.

2. To affirm the principle that under the Federal Aviation Act, the judiciary has the power and the duty to review an order of the Civil Aeronautics Board where the order is challenged on grounds of illegality in that the Board, in issuing such order, exceeded its statutory power.

3. To reinstate the broad scope of judicial review of Board orders contemplated by the Congress in enacting the Federal Aviation Act.

4. To eliminate the concept of an "implied" exemption from judicial review to an order which concerns a citizen indirect air carrier but which must have Presidential approval because it involves overseas and foreign air transportation.

5. To eliminate the concept that Presidential approval of an invalid Board order makes the order valid.

6. To preserve the integrity of the administrative process by making judicial review a check on Board action, particularly in those areas which relate to the jurisdiction of the Board; the arbitrary character of the Board's ruling; the adequacy of hearings and the lack of procedural due process of law.

7. To carry out the intention of Congress to guard against administrative action which exceeds the statutory bounds.

8. To prevent the Board from attempting to clothe its orders in a mystique of foreign policy or purported

expertise in international negotiations to achieve a nonreviewable status for the facts underlying its decisions.

CONCLUSION

Judicial review of administrative action is the only protection citizens have against arbitrary or illegal action by an administrative agency in excess of its jurisdiction. The right of judicial review should not be destroyed by an "implied exemption" which confers upon a President control over the orders of the Civil Aeronautics Board "unparalleled in the history of administrative bodies." The principle most consistent with the intent of the Congress is that where the order of the Civil Aeronautics Board is challenged on the ground of illegality, the judiciary should review the order and relevant circumstances to determine the issue of legality. If an order of the Civil Aeronautics Board is illegal, there is nothing in contemplation of law for the President to act upon, and in such circumstances presidential approval of an illegal Board order should not have the effect of precluding judicial inquiry into the power of the Board to make the challenged order.

The *Waterman* case, with its "implied exemption" concept, appears to have persuaded the Court of Appeals in the present case that the mere fact of Presidential approval foreclosed the Court from *any* review of the challenged order. In the present case, there was a total absence of considerations of national defense and foreign policy, the joint cornerstones upon which the majority of the Court in *Waterman* predicated its decision.

We respectfully suggest that a redefinition of the scope

of judicial review of orders of the Civil Aeronautics Board under the Federal Avaition Act is timely and in the public interest.

Respectfully submitted,

F. G. STAPLETON

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APPENDIX A

CIVIL AERONAUTICS BOARD ORDER NO. 71-10-114

United States of America, Civil Aeronautics Board, Washington, D. C.

Served: October 28, 1971.

Docket 22214 *et al.*

WILLY PETER DAETWYLER, dba INTERAMERICAN AIRFREIGHT CO.

Decided: September 17, 1971.

Foreign air carrier permit held by Willye Peter Daetwyler, authorizing indirect foreign air transportation of property from any point or points in the United States to any point or points outside the United States, renewed for a period of five years and issued in amended form to Willy Peter Daetwyler (Switzerland) d/b/a Interamerican Airfreight Co. (U.S.A.).

Application of Interamerican Air Freight Corporation for an Operating Authorization as a U. S. citizen international air freight forwarder pursuant to Part 297 of the Board's Economic Regulations, denied.

Application of Willy Peter Daetwyler and Interamerican Air Freight Corporation for approval of certain control and interlocking relationships pursuant to section 408 of the Federal Aviation Act, dismissed.

APPEARANCES:

Same as in the examiner's recommended decision.

BY THE BOARD:

This proceeding involves an application by Willy Peter Daetwyler d/b/a Interamerican Airfreight Co. (Daetwyler) for renewal of a section 402 indirect foreign air carrier permit (Docket 22214);[1] and the consolidated alternative application of Interamerican Air Freight Corporation (Interamerican) which requests an operating authorization as a U. S. citizen international air freight forwarder pursuant to Part 297 of the Economic Reguations (undocketed) in lieu of renewal of Daetwyler's foreign forwarder permit. Also consolidated in connection with the latter application,[2] is an application by Daetwyler and Interamerican for approval of control relationships with other Daetwyler forwarding corporations (Docket 22285).

Following a public hearing, Examiner William J. Madden issued his decision recommending that the application of Interamerican for authorization as a U. S. citizen international air freight forwarder pursuant to Part 297 of the Board's Economic Regulations, and the related control relationships, be approved. Accordingly, the examiner dismissed the application for renewal of Daetwyler's indirect foreign air carrier permit. Exceptions have been filed by the Bureau of Operating Rights and the Air Freight Forwarders Association, which inter-

[1]Issued pursuant to Order E-21914, approved March 16, 1965. The permit expired on April 15, 1970, and a renewal application was filed on May 20, 1970. Had the renewal application been timely filed, the prior permit would have continued in force. We agree with the Bureau that the delay in filing for renewal was not deliberate. Nonetheless, Daetwyler appears to have continued to conduct air freight operations without a permit. However, there is no indication that these operations were otherwise improper, and we are not prepared to hold that the continued operations are so disqualifying as to warrant denial of the application for lack of fitness. However, the renewal of the permit does not constitute any sanctioning or condonation of any wilful violation which may have occurred, and our Bureau of Enforcement is free to initiate such compliance action as may be warranted.

[2]Order 71-2-24.

vened in the proceeding.[3]

Upon consideration of the record and the contentions of the parties, the Board finds that it can not agree with the examiner that Interamerican should be issued international air freight forwarder authority as a U. S. citizen. On the other hand, we find that grant of the alternative application for renewal of Daetwyler's foreign air freight forwarder permit would be in the public interest.[4] Attached hereto as an Appendix is the recommended decision of the examiner whose findings, conclusions, and recommendations we adopt as our own, except as reversed and modified herein.

The single disputed issue in this case is whether Interamerican qualifies as a "citizen of the United States" pursuant to section 101(13) of the Federal Aviation Act[5] in such a manner that it would be in the public interest to issue international air freight forwarder authority to the carrier pursuant to the provisions of Part 297 of the Board's Economic Regulations. There is no dispute that 75% of the stock of Interamerican is nominally owned by U. S. citizens, and that

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[3]A brief to the Board has been filed by the applicant. The Bureau and the Air Freight Forwarders Association, the only other parties to the proceeding, each adopt their briefs to the examiner as their briefs to the Board. The Air Freight Forwarders Association has requested oral argument. However, the Board finds that the questions here at issue are principally ones of law and policy, that the parties have fully set forth their positions in their briefs, and that no useful purpose would be served by holding the oral argument. Accordingly, the request for oral argument will be denied.

[4]With denial of Interamerican's application under Part 297, the application for approval of the control relationships becomes moot and will accordingly be dismissed.

[5]Section 101(13) (49 U.S.C. 1301(13)) defines "Citizen of the United States" in pertinent part as " . . . (c) a corporation or association created or organized under the laws of the United States or of any State, Territory or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions."

two-thirds of the Board of Directors and other managing officers of Interamerican are U. S. citizens. The main emphasis of the divergent views presented to the examiner rests on the questions whether Daetwyler, a non-U.S. citizen of Swiss nationality, exercises direct or indirect control over Interamerican or the stock thereof, despite the two-thirds nominal ownership by U. S. citizens, and if so, whether such fact would preclude Interamerican from qualifying as a U. S. citizen, or would otherwise be a factor which would require a negative determination as to the public interest in granting Interamerican international air freight forwarder authority under Part 297 as a U. S. citizen. It is our view that Daetwyler is in a position of control of Interamerican, and that as a result of such control, Interamerican would not qualify as a citizen of the U. S. in accordance with the provisions of section 101(13) of the Act. We are further of the view that, even to the extent that Interamerican might technically qualify as a U. S. citizen under the section 101(13) provisions, under the circumstances present here, it would, nevertheless, be contrary to the public interest to authorize Interamerican to engage in international air freight forwarding as a U. S. citizen pursuant to the provisions of Part 297 of the Economic Regulations.

Despite the examiner's conclusion to the contrary, we believe that the record clearly reflects control by Daetwyler of Interamerican Air Freight Corporation. Any contrary conclusion represents a consideration of form over substance. The Daetwyler control is reflected by the fact that the corporation is the direct successor to the Daetwyler forwarding company, and created wholly at the instance of Daetwyler. Daetwyler, has, in fact, retained 25% stock

ownership, and represents one-third of the board of directors of the corporation, the maximum control technically permitted under the literal terms of section 101(13) Moreover, the corporation will continue to do business as part of the system of Daetwyler controlled companies In addition, there exists not only the close personal relationships between Daetwyler and his attorney and employees who constitute the remaining stockholders and officers and directors, but also, with the exception of Daetwyler's long-time attorney in both corporate and personal matters, the U. S. citizen stockholders, officers, and directors are employees of other admittedly Daetwyler controlled corporations, with interests which could be expected at the very least to represent a substantial inducement upon such employees to follow the wishes of Daetwyler.[6] Accordingly, there can be little doubt that Daetwyler would be in a position to sufficiently influence decisions of the board of directors and officers of Interamerican so as to constitute control under the Federal Aviation Act.[7]

We cannot agree that the section 101(13) definition of U. S. citizen would include a corporation meeting the bare minimum percent of ownership and directorships held by U. S. citizens, where control in fact lies in foreign citizens Specifically, we agree with the Bureau that the requirements that 75% of the voting interest be "owned or controlled by persons who are citizens of the United States," would not

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[6]The majority of the income of such employee stockholders is derived from the salary they receive from such other Daetwyler corporations.

[7]See *Railroad Control of Northeast Airlines* 4 C.A.B. 381 (1943). *Cf., Rochester Telephone Corporation vs. U.S.*, 307 U.S. 125, 145 (1939). See also, section 413 which provides that with respect to control "it is immaterial whether such control is direct or indirect."

encompass nominal 75% ownership with control by foreign citizens. We believe that the intent of Congress in enacting section 101(13) was to insure that air carriers issued licenses by the U.S., as U.S. air carriers, would be owned and controlled by citizens of the U.S.[8] To adopt the examiner's supposition that a construction to the effect that either ownership *or* control alternatively might suffice, would defeat the Congressional purpose of the citizenship provision. As is demonstrated by the manner in which Interamerican, under Daetwyler's control as we have found, would be able to qualify as a U.S. citizen, such a construction would readily permit foreign interests to acquire control of U. S. carriers.

Nevertheless, wholly aside from the question as to whether Interamerican has met the technical requirements of citizenship under section 101(13) of the Act, we are unable to conclude, under the circumstances demonstrated

[8]See, Hearing before Subcommittee of the Committee on Interstate Commerce, U. S. Senate on S. 2 and S. 1760. 75th Cong., 1st Sess., pp. 20, 79, 101, 423-24 (1937); Hearing before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 5234 and H.R. 4652, 75th Cong., 1st Sess., p. 261 (1937), and the resultant changes in the statutory definition of "citizen" in the legislative proposals which became the Civil Aeronautics Act and the Air Commerce Act. The legislative history shows objection to earlier bills on grounds that a corporation with only 51 percent control by U. S. citizens (the then existing Air Commerce Act standard) could qualify as a U. S. carrier. The principal sponsor of the Civil Aeronautics Act, Senator McCarran of Nevada, acquiesced in these objections and expressed the view that the definition of citizenship should be similar in both the Civil Aeronautics Act and Air Commerce Act. Both definitions were made more stringent, and the Air Commerce Act definition placed primary emphasis on control, thereby indicating that Congress intended that actual control be in U. S. citizens as well as ownership (which itself can be interpreted to denote unfettered ownership). Moreover, shortly after the passage of the Civil Aeronautics Act and revisions of the Air Commerce Act, the Board in essence indicated that it construed the legislative history in this fashion in *Uraba, Medellin and Central Airways, Inc.*, 2 C.A.B. 334, 337 (1940), where we stated, "The apparent general intent of the statute is to insure that air carriers receiving economic support from the United States and seeking certificates of public convenience and necessity under section 401 of the Act shall be citizens of the United States in fact, in purpose, and in management. The shadow of substantial foreign influence may not exist." The Board also indicated in that case that " . . . it may be permissible to look behind the form to the substance of the management of an air carrier to determine whether in fact, as well as in law, it is under the control of citizens of the United States . . . . "

by this record, that the grant of international air freight forwarder authority to Interamerican under Part 297 would be in the public interest. In addition to the technical requirements of the Act, we believe that the public interest criteria require an examination of the substantive effect of granting an authorization under such circumstances in light of Congressional policy as reflected by the Act's provisions. As noted, the effect of granting a U. S. citizen operating authorization, under the circumstances present here, would be to permit foreign control of carriers licensed by the U. S. as U. S. carriers. Such a result, regardless of technical qualifications under section 101(13), we find to be contrary to Congressional policy, and, therefore, similarly contrary to the public interest. In this respect, we believe that the Board must look at the substance of a transaction, rather than its form. And where an applicant has arranged its affairs so as to meet the bare minimum requirements set forth in the Act, it is the Board's view that the transaction must be closely scrutinized, and that the applicant bears the burden of establishing that the substance of the transaction is such as to be in accordance with the policy, as well as the literal terms of the specific statutory requirements. Scrutiny of the transaction here involved, far from demonstrating a genuine ownership and control in U. S. citizens, rather reflects domination and control by Daetwyler, a Swiss citizen.

Nevertheless, the record sufficiently establishes that renewal of Daetwyler's foreign air carrier permit would be in the public interest. The Board has previously found that the Swiss government grants reciprocity to U. S. citizen forwarders (Order E-21914), and nothing in the record would

indicate any change in the Swiss government's treatment of such U. S. forwarders.[9] Moreover, we find that Daetwyler is fit, willing, and able to hold a foreign indirect air carrier permit. Under these circumstances, we find that grant of the applicant's alternative request in Docket 22214 for renewal of its foreign air carrier permit, for a five-year period, would be in the public interest.

In view of the foregoing, and all the facts of record, the Board finds:

1. That it is in the public interest to issue an amended foreign indirect air carrier permit to Willy Peter Daetwyler (Switzerland) d/b/a Interamerican Airfreight Co. (U.S.A.), authorizing the holder, for a period of five years, to engage indirectly in foreign air transportation of property from any point or points in the United States to any point or points outside of the United States.

2. That the public interest requires that the exercise of the privileges granted by the permit shall be subject to the terms, conditions, and limitations contained in the accompanying order and attached form of permit, and to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.[10]

3. That Willy Peter Daetwyler (Switzerland) d/b/a Interamerican Airfreight Co. (U.S.A.), is fit, willing, and able

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[9]Contrary to Daetwyler's suggestion, the Treaty of Friendship and Commerce between the Swiss Confederation and the United States does not provide the basis for issuance of such permit. See, Interamerican Forwarding Corporation, Order E-21914, approved March 16, 1965.

[10]The amended permit herein will incorporate the standard conditions recently included in permits issued to foreign international air freight forwarders.

properly to perform the above-described foreign air transportation, and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder.

4. That the application of Interamerican Air Freight Corporation for an Operating Authorization as a U. S. citizen international air freight forwarder pursuant to Part 297 of the Board's Economic Regulations is not in conformance with the requirements of the Act; that grant of the application would in any event be contrary to the public interest; and accordingly that said application should be denied.

5. That the joint application of Willy Peter Daetwyler and Interamerican Air Freight Corporation for approval of certain control and interlocking relationships pursuant to section 408 of the Federal Aviation Act should be dismissed.

6. That the Air Freight Forwarders Association's request for oral argument should be denied.

7. That, except to the extent granted or dismissed herein, the applications of Willy Peter Daetwyler d/b/a Interamerican Airfreight Co. and Interamerican Air Freight Corporation, and all other requests in this proceeding, should be denied.

An appropriate order will be entered.

BROWNE, Chairman, GILLILLAND, Vice Chairman, MINETTI, MURPHY and TIMM, Members of the Board, concurred in the above opinion.

(APPENDIX to Appendix A) DOCKET 22214 *et al.*

THE EXAMINER'S RECOMMENDED DECISION REFERRED TO HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION GIVEN AT THE TIME OF ITS RELEASE. THE RECOMMENDED DECISION IS ATTACHED TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES IN THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision;

IT IS ORDERED:

1. That an amended foreign indirect air carrier permit in the form attached hereto be issued to Willy Peter Daetwyler (Switzerland) d/b/a Interamerican Airfreight Co. (U.S.A.);

2. That said permit shall be signed on behalf of the Board by its Secretary, shall have affixed thereto the seal of the Board, and shall be effective upon the effective date of this order;

3. That the exercise of the privileges granted by said permit shall be subject to the terms, conditions, and limitations prescribed therein, those set forth below in subparagraphs (a) through (d), and such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board;

(a) In respect to operations conducted pursuant to the authority granted by said permit, the holder, with respect to the use of aircraft, shall be subject to the provisions of sections 297.21, 297.22, and 297.23 of the Board's Economic Regulations, as now or hereafter amended;

(b) Prior to the commencement of operations under said permit and at all times thereafter, the holder shall comply with the insurance coverage provisions of section 297.45 of the Board's Economic Regulations, as now or hereafter amended, except that it shall not be necessary for the holder to provide public liability insurance for its operations outside

the United States;

(c) That in using the authority granted herein (1) the name Willy Peter Daetwyler (Switzerland) d/b/a Interamerican Airfreight Co. (U.S.A.) shall appear on all of the holder's advertising, air waybills, stationery and the like; (2) the above name will always be used in its entirety; (3) and the name Willy Peter Daetwyler (Switzerland) shall be displayed at least as prominently as the name Interamerican Airfreight Co. (U.S.A.);

(d) The holder shall file with the Board annual traffic and financial reports at such time and in such form as the Board may hereafter prescribe: *Provided, however,* That until such time as the Board prescribes the form of reports for foreign indirect air carriers, the holder shall file in duplicate with the Board's Bureau of Accounts and Statistics annual traffic and financial reports within two months after the expiration of its fiscal year, setting forth in pounds the cargo carried each month during the last fiscal year, the total cargo carried during this period, the points between which the cargo was carried, and the profit or loss from its operations during this period;

4. That the application of Interamerican Air Freight Corporation for international air freight forwarder authority pursuant to Part 297 of the Board's Economic Regulations be and it hereby is denied;

5. That the joint application of Willy Peter Daetwyler and Interamerican Air Freight Corporation for approval of certain control and interlocking relationships pursuant to section 408 of the Federal Aviation Act be and it hereby is dismissed;

6. That the request of the Air Freight Forwarders

Association for oral argument be and it hereby is denied;

7. That, except to the extent granted or dismissed herein, the application of Willy Peter Daetwyler d/b/a Interamerican Airfreight Co., and all other requests herein, be and they hereby are denied; and

8. That this order shall become effective upon the date of its approval by the President of the United States.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)
THE WHITE HOUSE
APPROVED:
Richard Nixon
October 23, 1971.

†

PERMIT TO FOREIGN INDIRECT AIR CARRIER
(as amended)
Issued pursuant to Order 71-10-114
by
United States of America, Civil Aeronautics Board, Washington, D.C.

WILLY PETER DAETWYLER (Switzerland)
d/b/a INTERAMERICAN AIRFREIGHT CO. (U.S.A.)

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage indirectly in foreign air transportation of property from any point or points in the United States to any point or points

outside the United States.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting the right to engage in indirect air transportation of property now in effect, or that may become effective during the period this permit remains in effect, to which the United States and Switzerland shall be parties.

This permit shall be subject to the condition that in the event that any practice develops which the Board regards as inimical to sound economic conditions, the holder and the Board will consult with respect thereto and will use their best efforts to agree upon modifications thereof satisfactory to the Board and the holder.

The exercise of the privileges granted hereby shall be subject to the terms, conditions, and limitations set forth in Order 71-10-114 dated September 17, 1971, and to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

By accepting this permit the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

This permit shall become effective on October 23, 1971, and shall terminate five years thereafter: *Provided, however:* That if during said period the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and Switzerland are or shall become parties, then and

in that event this permit shall continue in effect during the period provided in such treaty, convention, or agreement.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 17th day of September, 1971.

HARRY J. ZINK
Secretary

(SEAL)

Issuance of this permit
to the holder approved by the
President of the United States
on October 23, 1971,
in Order 71-10-114.

†

ORDER OF DISMISSAL
by
THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

INTERAMERICAN AIR FREIGHT CORPORATION, a California corporation, Petitioner, vs. CIVIL AERONAUTICS BOARD, Respondent.

No. 71-3050

[August 6, 1973]

Before: CHAMBERS and KOELSCH, Circuit Judges, and PLUMMER,* District Judge.

PER CURIAM:

The appeal is dismissed.

The denial by the Board and the President of exemptions to Interamerican from permit requirements under 14 C.F.R. § 297, *et seq.*, we conclude, is not subject to our review. We base this on our reading of 49 U.S.C. § 1461, 49 U.S.C. § 1486, and *C&S Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

*The Honorable Raymond E. Plummer, United States District Judge, District of Alaska, sitting by designation.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on OCTOBER , 1973, I served the within PETITION FOR WRIT OF CERTIORARI (Interamerican Air Freight Corporation v. C.A.B.) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Solicitor General of the United States
U. S. Department of Justice
Washington, D. C. 20530
(3 copies)

R. Tenney Johnson
General Counsel
Civil Aeronautics Board
Washington, D. C. 20428
(2 copies)

Walker B. Comegys
Acting Assistant Attorney General
Department of Justice
Washington, D. C. 20530
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER , 1973, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Original and 40 copies forwarded to the U. S. Supreme Court, Washington, D. C.

Dean-Standefer, 326½ Main Street, Huntington Beach, Ca.
(714) 536-7161

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No. 73-724

FILED
JAN 22 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERAMERICAN AIR FREIGHT CORPORATION, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The findings and order of the Civil Aeronautics Board (Pet. App. 1-14) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1973 (Pet. App. 15). The petition for a writ of certiorari was filed on November 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 1006(a) of the Federal Aviation Act and this Court's decision in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, preclude judicial review of an order of the Civil Aeronautics Board, approved by the President, which granted a foreign resident of the United States a permit to engage in international air freight forwarding, but denied similar authority to a California corporation controlled by that foreign resident.

STATUTES INVOLVED

Sections 801 and 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1461 and 1486, are set forth in the Appendix (*infra*, pp. 13–14). The Board's economic regulations appear in 14 C.F.R. Part 297.

STATEMENT

This case involves the disposition by the Civil Aeronautics Board and the President of alternative applications for authority to conduct air freight forwarding operations between the United States and foreign points. In an order approved by the President, the Board denied the application of petitioner Interamerican Air Freight Corporation, a California corporation organized and controlled by Willy Peter Daetwyler, a Swiss resident of the United States, for authority to conduct such operations as a citizen air carrier, but granted Daetwyler's alternative application for a foreign air carrier permit authorizing him to do so as an individual.

1. The Federal Aviation Act of 1958 (49 U.S.C. 1301, *et seq.*) sets up a comprehensive scheme for regulating domestic and foreign air transportation. Section 401 of the Act (49 U.S.C. 1371) provides that a United States citizen air carrier may not engage in any air transportation (domestic or foreign) without a certificate of convenience and necessity issued by the Board. Section 801 (49 U.S.C. 1461) requires approval by the President of any order granting or denying a certificate to a citizen air carrier authorizing foreign air transportation. Such orders are not subject to judicial review. *C. & S. Airlines* v. *Waterman Corp.*, 333 U.S. 103.

Non-citizen (foreign) air carriers may not engage in domestic air transportation, but they may engage in foreign air transportation, *i.e.*, service between the United States and foreign points. Section 402 of the Act (49 U.S.C. 1372) provides that a foreign air carrier wishing to engage in foreign air transportation must obtain a permit from the Board. The grant or denial of a foreign air carrier permit must also be approved by the President under Section 801 of the Act (49 U.S.C. 1461). Section 1006(a) of the Act (49 U.S.C. 1486(a)) expressly precludes judicial review of "any order in respect of any foreign air carrier subject to the approval of the President * * *."

Authorization from the Board is required by persons engaged "indirectly" in air transportation (*e.g.*, air freight forwarders), as well as by those engaged "directly" in air transportation (*i.e.*, operators of aircraft). Section 101(3) of the Act (49 U.S.C. 1301(3)),

however, authorizes the Board to exempt citizen air carriers "not directly engaged in the operation of aircraft" from the certificate requirement of Section 401 of the Act (49 U.S.C. 1371). Acting under this authorization the Board has promulgated regulations exempting citizen air freight forwarders from the certificate requirements of Section 401, and providing for a system of non-certificated licensing for citizen air carriers for both domestic (14 C.F.R. Part 296) and foreign (14 C.F.R. Part 297) air freight forwarding operations. Unlike orders issued under Section 401 granting or denying certificates for foreign operations, orders granting or denying exemptions for such operations are not required by the Act to be approved by the President. See, *Pan American World Airways* v. *Civil Aeronautics Board,* 261 F. 2d 754 (C.A.D.C.), certiorari denied, 359 U.S. 912.

Since the Act contains no provision authorizing the Board to exempt foreign air carriers from the Act's requirements, there is no regulation comparable to Part 297 for foreign air freight forwarders. Their operations, like those of foreign direct air carriers, must be authorized by a foreign air carrier permit, issued, with the President's approval, under Section 402.

2. Willy Peter Daetwyler, doing business as Interamerican Airfreight Co. (the "Company"), is a Swiss citizen who had been conducting foreign air freight forwarding operations since 1965 under a foreign air carrier permit granted to him pursuant to Section

402.[1] In 1970 Daetwyler filed an application for renewal of his Section 402 permit. At the same time, an alternative application was also filed by petitioner, Interamerican Air Freight Corporation ("IAF"), requesting authorization as a United States citizen, pursuant to Part 297 of the Board's economic regulations, to conduct foreign air freight forwarding operations.

IAF is a California corporation organized by Daetwyler in 1970 for the avowed purpose of succeeding to the business of the Company, but as a United States citizen forwarder operating under Part 297. To this end, IAF had concededly been structured to meet the literal definition of "citizen of the United States" set forth in Section 101(13) of the Act (49 U.S.C. 1301(13)),[2] and Part 297 of the Board's regulations (14 C.F.R. 297.1).

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[1] The Section 402 permit was issued by the Board pursuant to C.A.B. Order E–21914, approved by the President on March 16, 1965. It was issued to Mr. Daetwyler in his individual capacity rather than to another corporation then controlled by him (Interamerican Forwarding Corporation) because the Board determined, *inter alia*, that the grant of a foreign air carrier permit to a United States corporation controlled by a foreign national would be contrary to the public interest (Order E–21914, at 5–6).

[2] Section 101(13) provides that:

> "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by

At the consolidated hearing on the two applications, the opponents of the IAF application contended that Daetwyler was in a position to exercise control over the affairs of IAF and that the grant of Part 297 authority to a corporation controlled by a foreign national would not be consistent with the "public interest" (see 14 C.F.R. 297.34).[3]

While recognizing that the inference of control of IAF by Daetwyler "is not without reason and logic," the hearing examiner drew the opposite inference because, in his view, there was no indication of a devious purpose in adoption of the corporate form and no indication of any harmful result. He therefore recommended grant of IAF's application under Part 297 (and consequent dismissal of Daetwyler's alternative Section 402 application).

The Board agreed with its hearing examiner on the underlying facts, but reached a contrary conclusion on

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persons who are citizens of the United States or of one of its possessions.

The principals of IAF were:

Stockholder	Citizenship	Percentage of stock ownership	Office and directorships
Daetwyler	Swiss	25	Director.
Pittman	United States	5	Do.
Stapleton	do	30	Director and Secretary-Treasurer.
Saxer	do	20	President.
Wintsch	do	15	Vice President.
Schmid	do	5	Vice President—Accounting and Assistant Secretary.

[3] If, indeed, such control would permit a finding that IAF was a United States citizen within the meaning of Section 101(13).

the question of control, a conclusion which the hearing examiner himself indicated would be rational and logical. The Board found that Daetwyler "would be in a position to sufficiently influence decisions of the board of directors and officers of [IAF] so as to constitute control under the Federal Aviation Act" (Pet. App. 5). See 49 U.S.C. 1383.[4] With respect to IAF's application for Part 297 authority, the Board found that "wholly aside" from IAF's technical citizenship status, "the effect of granting a U.S. citizen operating authorization, under the circumstances present here, would be to permit foreign control of carriers licensed by the U.S. as U.S. carriers" (Pet. App. 6–7). It concluded that "[s]uch a result, regardless of technical qualifications under section 101(13), [would be] contrary to Congressional policy, and, therefore, similarly contrary to the public interest" (Pet. App.

[4] This conclusion rested primarily on the following facts (Pet. App. 4–5):

1. IAF was the "direct successor" of the Daetwyler-controlled Company and was "created wholly at the instance of Daetwyler";

2. Daetwyler had retained the maximum formal control permitted by the literal terms of the statutory definition of "United States citizen";

3. IAF would "continue to do business as part of the system of Daetwyler controlled companies";

4. The existence of "close personal relationships" between Daetwyler and the other principals of IAF; and

5. The principals (with the exception of Daetwyler's "long-time attorney in both corporate and personal matters") were employees of other Daetwyler-controlled companies who derive most of their income from such other companies and who had "interests which could be expected at the very least to represent a substantial inducement upon such employees to follow the wishes of Daetwyler."

7).[5] The Board accordingly denied the IAF application, but granted Daetwyler's application for renewal of his foreign air carrier permit (Pet. App. 7–8).

The Board's opinion and order were adopted on September 17, 1971, and transmitted to the President for his approval under Section 801 of the Act. The President signed the order on October 23, 1971, thus signifying approval (Pet. App. 12), and the decision was released.

3. On IAF's petition for review, the Board contended that under Sections 801 and 1006(a) of the Act (49 U.S.C. 1461, 1486(a)), and *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, the decision as approved by the President was not reviewable. The court of appeals agreed and dismissed the appeal in a *per curiam* order (Pet. App. 15).

ARGUMENT

The court of appeals correctly decided this case and the petition raises no issue warranting further review.

1. Section 1006(a) of the Federal Aviation Act (49 U.S.C. 1486(a)) expressly withholds from the courts of appeals jurisdiction to review "any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801." The order which petitioner attacks was an "order in respect of [a]

[5] While not necessary to its decision, the Board also determined that IAF could not in any event be granted an authorization under Part 297. It ruled that IAF, which is in fact controlled by a foreign national, is not a citizen of the United States within the meaning of Section 101(13), even though it met the literal requirements of that statutory provision (Pet. App. 5–6).

foreign air carrier," since it granted Daetwyler's application to renew his foreign air carrier permit. Orders granting or denying such permits must be submitted to the President for approval under Section 801 of the Act and the order was in fact approved by the President. Thus, Section 1006(a) precludes any appellate review of this order.

In disposing of matters subject to Presidential approval under Section 801, the Board's role is simply that of advisor to the President. In performing this role, the Board prepares an opinion setting forth its recommended disposition of the case and the reasons therefor. The opinion, together with the formal order effectuating it, is then transmitted to the President prior to publication. If the President approves he so indicates simply by signing the order. Upon approval, the opinion and order are published as the final and effective decision in the case, a decision which "derives its vitality from the exercise of unreviewable Presidential discretion." *Waterman, supra,* 333 U.S. at 113.

It is true that Section 1006(a), which refers only to "foreign air carriers," does not literally cover applications by citizen air carriers. But that makes no difference here. For in this case, even assuming that IAF is a citizen air carrier (see n. 5, *supra*), the two aspects of the decision to renew Daetwyler's Section 402 permit and reject IAF's alternative request for Part 297 authority were functionally inseparable. The applications were mutually exclusive. The renewal of Daetwyler's permit was based on the rejection of IAF's request for authority to perform identical services. Conversely,

if the Board had determined that IAF's request should be granted, it would have been required to recommend to the President that Daetwyler's application be denied. If the court of appeals had undertaken to review the President's decision on IAF's application, the congressional purpose embodied in Sections 801 and 1006 of the Act to foreclose judicial review of such decisions would have been frustrated.

This principle has been recognized in comparable situations. In *Trans World Airlines, Inc.* v. *Civil Aeronautics Board,* 184 F. 2d 66 (C.A. 2), certiorari denied *sub nom. Sparks* v. *Civil Aeronautics Board,* 340 U.S. 941, the order involved the transfer of a temporary certificate for foreign air transportation and the acquisition of the assets of one carrier by another. The court held that the certificate transfer required Presidential approval, but assumed that the asset acquisition would ordinarily be subject to judicial review. The court held, nevertheless, that "where, as in the present case, the acquisition of assets and the transfer or amendment of a certificate are inextricably mingled in the same proceeding, we think that the Congressional purpose to grant the President discretion as to overseas air transportation would be thwarted to permit judicial review of that portion of the order relating to acquisition of assets." *Id.* at 71.

2. Even if the denial of the IAF application were viewed as a divisible part of the order, the *Waterman* decision precludes review. That case involved a citizen air carrier which had been denied a certificate to engage in foreign air transportation. Section 1006(a)

did not literally preclude judicial review because a citizen air carrier was involved. Nevertheless, in the light of Congress's purpose, as expressed in Section 801, to have such applications considered by the President as he is responsible for direction of the nation's foreign policy, judicial review of the Board's decision prior or subsequent to his action, or review of the President's action itself, was held to be inconsistent with the statute's objectives. It would place courts in a position of reviewing "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." 333 U.S. at 111.[6]

Although Section 801, which requires Presidential approval for citizen air carrier certificates to engage in foreign air transportation, is not applicable to a Part 297 exemption authorizing foreign air transportation, a Presidential decision to approve the denial of such an exemption has the same effect as a decision to deny a certificate to engage in foreign operations. The prin-

[6] Some subsequent decisions of the courts of appeals have held that the *Waterman* rule does not preclude judicial review to determine whether an order involving foreign operations of citizen carriers is *ultra vires*. *American Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F. 2d 349 (C.A. D.C.); *Pan American World Airways, Inc.* v. *Civil Aeronautics Board*, 380 F. 2d 770 (C.A. 2), affirmed by an equally divided Court *sub nom. World Airways, Inc.* v. *Pan American World Airways, Inc.*, 391 U.S. 461. That exception to the *Waterman* rule would not be applicable in this case because there is no question that the Board has authority to grant or deny Part 297 applications. Moreover, the exception is not applicable to orders involving foreign air carriers. Cf. *Pan American World Airways, Inc.* v. *Civil Aeronautics Board*, 392 F. 2d 483, 493 (C.A. D.C.)

ciples underlying *Waterman* should apply to any attempt to subject such a decision to judicial review.

The petitioner apparently does not dispute that the decision below is in accordance with established precedent, but, in effect, urges the court to reconsider *Waterman,* which has stood for more than 25 years without legislative modification (Pet. 17). We submit that there is no reason to do so. The non-severable nature of the Board's order, discussed above (pp. 9–10), is itself sufficient to support the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 737, as amended (49 U.S.C. 1301, *et seq.*):

* * * * *

TITLE VIII—OTHER ADMINISTRATIVE AGENCIES

THE PRESIDENT OF THE UNITED STATES

Sec. 801 (49 U.S.C. 1461). The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

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TITLE X—PROCEDURE

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

Sec. 1006 (49 U.S.C. 1486). (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition therefore.

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